91-1011

Supreme Court, U.S.
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CASE NO. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

JOSEPH H. HALE,
EVA M. HALE, SHELLY HULL,
SHEILA HARTJE and SHERRY HALE,
Petitioners,

v.

THOMAS J. CARLSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Was the right to a trial by jury of the non-debtor litigants in this adversary proceeding in bankruptcy abridged by the bankruptcy court's refusal to grant a jury trial to those defendants, where they were entitled to a jury trial under the clearly announced law of this Court, and requested such trial within the prescribed period after the filing of an answer which the court had them allowed to file out of time?

2. Were the petitioners denied due process, and was an impermissible chill placed on their Fifth Amendment privilege against self-incrimination, by the cooperation between the trustee in bankruptcy and the United States Attorney's office with respect to the contemplated recantation of a witness's sworn testimony, where the petitioners, who were defendants in an adversary proceeding, did not learn of the recantation until after the commencement of the trial, the recanted testimony formed the basis of a planned criminal indictment of the defendants and the defendants were denied a continuance when the new testimony was disclosed?

3. Does the applicable federal statute and the canon of ethics governing federal judges require recusal of a federal judge based upon prejudice demonstrated by remarks made by the judge about litigants and their counsel, even though such remarks were made during the course of judicial rulings and may have been based on facts learned during the proceeding, where disqualification would otherwise be warranted?

LIST OF PARTIES

The original parties to the actions were Thomas J. Carlson, Trustee in Bankruptcy; plaintiff, Joseph H. Hale, Eva M. Hale, Shelly Hull, Sheila Hartje, Sherry Hale, and Metropolitan Bank, defendants/respondents; and State Financial Corporation, Intervenor. The defendant Metropolitan Bank was dismissed from the case. The intervenor did not file a brief on appeal. The remaining defendants join together in this Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Joseph H. Hale, Eva M. Hale, Shelly Hull, Sheila Hartje and Sherry Hale, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on 19 June 1991, and as to which rehearing was denied by order entered 01 August 1991.

OPINIONS BELOW

The U.S. Bankruptcy Court for the Western District of Missouri, the Honorable Karen M. See, B.J., filed an opinion in this cause which was not reported. The U.S. District Court for the Western District of Missouri, the Honorable Russell G. Clark, District Judge, filed an opinion in this cause which was also not reported. Finally, in an unpublished *per curiam* opinion, the Court of Appeals for the Eighth Circuit affirmed the lower courts. All of these opinions are reprinted in the herewith filed appendix.

JURISDICTION

This case arises from an appeal to the Court of Appeals for the Eighth Circuit from a decision entered by the U.S. District Court for the Western District of Missouri, Southern Division, affirming the judgment of the U.S. Bankruptcy Court for the Western District of Missouri, Southern Division, in an adversary proceeding in bankruptcy. The bankruptcy court's decision was entered on 06 November 1989. The notice of appeal of the bankruptcy court's decision was timely filed on 15 November 1989.

The District Court's jurisdiction was predicated upon 28 U.S.C. § 158(a). That court's judgment was issued on 01 August 1990. The notice of appeal therefrom was timely filed on 27 August 1990.

The Court of Appeals' jurisdiction was based upon 28 U.S.C. § 1291. Its decision was entered on 19 June 1991. A timely filed petition for rehearing was denied by order entered 01 August 1991.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in the disposition of this case:

1. **Amendment V, U.S. Constitution**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **Amendment VII, U.S. Constitution**

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. **28 U.S.C. § 455. Disqualification of justice, judge, or magistrate**

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

This case comes before this Court after the U.S. District Court for the Western District of Missouri upheld the bankruptcy court's order granting the trustee's motion for settlement of the estate's interest in the probate estate of Thomas Graves, and finding in favor of the trustee on a complaint for turnover. Subsequently, the Court of Appeals for the Eighth Circuit affirmed the district court's holding, and denied a motion for rehearing of the cause.

The underlying bankruptcy was filed by debtors Joseph and Eva Hale under Chapter 12 of the Bankruptcy Code, and subsequently was involuntarily converted to a Chapter 11 and finally to a Chapter 7 proceeding.

On 27 May 1988, an adversary proceeding was tried before the bankruptcy court, simultaneous with a hearing on a motion for appointment of trustee filed by the creditor which was the defendant in the adversary proceeding. The debtors were represented by counsel as to the motion for appointment of trustee, but appeared *pro se* as to the adversary proceeding.

The bankruptcy court found in favor of the defendant in the adversary proceeding; found that the debtors had attempted to conceal assets; and appointed a trustee.

Subsequently, the trustee filed his motion for approval of settlement of the bankruptcy estate's interest in the probate estate of Thomas Graves, the father of debtor Eva Hale. At the same time, the trustee filed his

complaint for turnover.

The motion for approval sought to compromise the bankruptcy estate's alleged interest in the Graves probate estate. By way of a document dated 17 March 1982, Mrs. Hale had assigned her interest in that estate to her daughters, Shelly Hull, Sheila Hartje and Sherry Hale (hereinafter "the Hale daughters"). The complaint for turnover sought, *inter alia*, recovery of a partial distribution from that estate to the Hale daughters.

Richard Martin, personal representative of the Thomas Graves probate estate, was deposed on behalf of the trustee. After the deposition, Martin contacted the office of the U.S. Attorney in Springfield, Missouri, claiming that he wanted to recant his deposition testimony. On 03 October 1989, Martin met with the trustee's attorney; the attorney for one of the creditors; and a member of U.S. Attorney's office. Counsel for the debtors, for the intervenor, and for the Hale daughters were neither informed of nor present at this meeting.

The trial commenced on 05 October 1989 at 10:06 a.m. with the argument of pre-trial motions, among which were two motions to recuse the judge, one filed by the debtors and one filed by the Hale daughters. The Hale daughters also filed a Request for a Jury Trial.

The court disallowed argument on the motions to recuse and summarily overruled them.[1]

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[1]Although the Hales' Motion for Recusal was filed on 28 September 1989, and called to the court's attention in a pre-trial conference on 29 September 1989, the court disavowed knowledge of said motion at the hearing. The court briefly skimmed the motion and overruled it. Tr. at 7.

As to the Hale daughters' request for jury trial, the court held that said request had been filed on the tenth day following the filing of the answer, and then denied the request.[2]

The case proceeded to trial on the newly formulated testimony of Richard Martin, who also testified that he surrendered his attorneys' license and was in the process of closing his practice. Martin testified that in 1988 he created an assignment dated 1982, so that it would appear that the probate estate of Thomas Graves had been assigned by Eva Hale to her daughters prior to the filing of the bankruptcy.

Martin further testified that he had converted at least $45,000.00 of proceeds of the Thomas Graves probate estate to his own exclusive use. He testified that none of the appellants asked to do so or benefitted from the conversion. He testified that as far as he knew none of the appellants knew of his embezzlement.

The court found for the trustee on his motion and his complaint for turnover. Subsequently, the debtors, the intervenors and the Hale daughters timely filed their notices of appeal. Both the district court and the Court of Appeals affirmed the bankruptcy court's ruling.

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[2]The court had preciously granted the Hale daughters leave to file their answer out of time, and that answer was filed on 25 September 1989. The Request for Jury Trial was filed on 04 October 1989, nine days after the answer was filed.

REASONS FOR GRANTING THE WRIT

1. The right to a trial by jury of the non-debtor litigants in this adversary proceeding in bankruptcy was abridged by the bankruptcy court's refusal to grant a jury trial to those defendants, where they were entitled to a jury trial under the clearly announced law of this Court, and requested such trial within the prescribed period after the filing of an answer which the court had allowed them to file out of time.

This case presents issues of substantial importance to the administration of the federal court system and to the protection of the rights of non-debtor litigants in bankruptcy proceedings. The disposition of this case far exceeds the mere rights of the litigants to this case, and in fact extends to the fundamental rights of parties in our judicial system. Further, determination of this case may shake the complacency with which bankruptcy judges have handled the rights of parties coming before them.

In *Granfinanciera v. Nordberg*, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), this Court held that a non-claimant creditor who is a defendant in an action filed by the trustee to set aside allegedly fraudulent transfers is entitled to a jury trial. 106 L.Ed.2d at 55. In so holding, the Court stated that even though the thrust of the Seventh Amendment was to preserve the right to jury trial as it existed in 1791, it also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. 106 L.Ed.2d at 40, citing *Curtis v. Loether*, 415 U.S. 189 (1974).

Since *Granfinanceria*, the right of a non-debtor to a jury trial has not been limited by any decision of this Court. Moreover, the denial of a right to jury trial will be subject to exacting scrutiny. *City of Morgantown v. Royal Ins. Co., Ltd.*, 69 S.Ct. 1067, 1069-70 (1949).

Notwithstanding these principles, the non-debtor defendants in the adversary proceeding which gave rise to this Petition were denied a timely-filed request for jury trial, under the legal pretext of a discretionary action by a bankruptcy judge. Thus, this case presents the significant and far-reaching issue of whether a federal judge can exercise discretion to set limits on the exercise of a Constitutionally protected right, which limits have no basis in any decision of this Court or any provision lawfully enacted by Congress.

The urgency of the need for this Court's review is underscored by the language used in the district court's affirmance of the bankruptcy court's language. Citing to an English Circuit case, the district court noted first that "[t]he trial court has the discretion to grant a belated request for a jury trial". District Court Opinion at 5. That case, *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980), involved, on pertinent point, an oral request for a jury trial made at a pre-trial conference, where the failure to make the request in writing was deemed to be a waiver of the right to jury trial. 614 F.2d at 585.

Moreover, although the Eight Circuit's opinion suggests that the request was not timely, the request in the instant case certainly was. To

dismiss this fact, the district court said simply: "However, even assuming that appellant's request for a jury trial was timely filed, the Bankruptcy Court did not abuse its discretion in denying appellants' request on the morning of trial." District Court Opinion at 5.

Without question, no federal court has the discretion to deny a properly asserted request for a jury trial. Hence, the district court, and the Eighth Circuit by way of its *per curiam* affirmance, have imposed an impermissible curtailment of the defendants' constitutionally protected right to a jury trial as announced in this Court's decision in *Granfinanciera.*

The three non-debtor defendants were granted leave by the bankruptcy court to file their answer late, as acknowledged by the district court in its opinion. Their written request for a jury trial was filed within ten days thereafter. Hence, the bankruptcy court had no discretion to deny their right to a jury trial.

Review by this Court is necessary to give guidance to the lower courts as to whether or not a trial court has discretion to deny an otherwise existent right to a jury trial in situations similar to those arising in the instant case.

2. The petitioners were denied due process, and an impermissible chill was placed on their Fifth Amendment privilege against self-incrimination, by the cooperation between the trustee in bankruptcy and the United States Attorney's office with respect to the contemplated recantation of the sworn testimony of a witness's sworn testimony, where the petitioners, who were defendants in an adversary proceeding, where the petitioners, who were defendants in an adversary proceeding, did not learn of the recantation until after the commencement of the trial, the recanted testimony formed the basis of a planned criminal indictment of the defendants, and the defendants were denied a continuance when the new testimony was disclosed.

Congress perpetuated the institution of bankruptcy in order to protect debtors while allowing them to reorganize their debts. This purpose was thwarted in the instant case by the manner in which the trustee in bankruptcy, aided and advance by the bankruptcy judge, cooperated with the United States Attorneys' Office to the prejudice of the debtors and the non-debtor defendants. At the same time, an impermissible chill was placed on those parties' right to assert their privilege against self-incrimination as protected by the Fifth Amendment to the United States Constitution, and the due process mandates of the Fifth Amendment were violated.

In this case, the trustee withheld from the debtors and the non-debtor defendants pivotal information regarding and the planned recantation of testimony by a previously deposed witness from the petitioners.

As a result of the cooperation between the trustee and the United States Attorneys' Office, the petitioners were forced to choose between an uniformed relinquishment of their constitutional right not to provide incriminating testimony and a planned defense of claims made against

them by the trustee. The petitioners had neither time nor opportunity to sufficiently inform themselves as to the probability and parameters of a future criminal indictment before they had to decide whether or not to testify.

As a result, one of the petitioners, Joseph Hale, who was subpoenaed by the trustee during the proceeding, invoked the Fifth Amendment privilege. The other petitioners declines to testify in order not to unintelligently waive or invoke the privilege. The bankruptcy court used the invocation of the Fifth Amendment to conclude that Mr. Hale would incriminate himself, and based on that conclusion found that he and the other petitioners had committed fraud. A substantial money judgment was awarded against all of the petitioners.

Once the Fifth Amendment privilege against self-incrimination is waived as to a particular subject, it cannot be re-claimed. *Rogers v. U.S.*, 71 S.Ct. 438, 442 (1951). Such waiver must be intentional. *See, e.g., id.* at 444 (dissenting opinion). Accordingly, it is incumbent upon individuals to make decisions with respect to that privilege in an intelligent and voluntary way. Similarly, it is incumbent upon their counsel to have a substantial data base from which to advise their clients as to whether or not they should assert their Fifth Amendment Privilege.

In the instant case, a witness had given detailed deposition testimony regarding the drafting by him of legal documents for Joseph and Eva Hale in 1982. The documents effectively transferred Mrs. Hale's interest in her

father's probate estate to the Hale's daughters, the remaining three petitioners.

Those documents were later alleged to have been created in 1988, after the filing of the debtors' bankruptcy. If the documents had been created in 1988, the Hales and their daughters might well be guilty of bankruptcy fraud.

The record reflects that the trustee's office and the U.S. Attorney's office cooperated to the extent that cooperation with the trustee's office was a condition of a grant of immunity to the witness in question. The witness did agree to cooperate, and in fact met with the trustee's attorney and law partner one day before that witness was to testify. A creditor's attorney was also present.

The debtors, their counsel, the non-debtor defendants and their counsel were not informed of the development until after the pre-trial motions were argued at the start of the hearing. The information came by way of an in-court announcement by the U.S. Attorney that the witness would testify under a grant of federal immunity and that his testimony had criminal implications relative to one or more of the debtors.

The defendants then had approximately forty-five minutes to confer with counsel, scramble to determine what the changed testimony would be, and decide whether or not to testify when one or more of the defendants previously had agreed to do so on behalf on the intervenor. To compound the pressures of the situation, one of the debtors, Joseph Hale, was

subpoenaed by the trustee as Mr. Hale stood in the hallway conferring with counsel regarding the announcement of the U.S. Attorney and its implications with respect to a future criminal prosecution.

In short, the bankruptcy process was manipulated by the U.S. Attorneys' office, and in the course of that manipulation, these petitioners had to make decisions of constitutional significance on forty-five minutes' notice under highly prejudicial conditions. The petitioners maintain, and ask this Court to determine, that such a manipulation of the bankruptcy courts is inconsistent with the Congressional intentions in enactment of the Bankruptcy Code. The petitioners further maintain, and ask this Court to determine, that such a manipulation of the bankruptcy courts is fundamentally irreconcilable with Constitutional precepts of fairness and due process, and with the Fifth Amendment privilege against self-incrimination as that privilege has been interpreted by this Court.

The test for determining whether governmental action gives rise to an impermissible chill on the exercise of a constitutionally protected right is "whether the burden on the exercise of the right ... is necessary, not whether it is only incidental to the accomplishment of some legitimate state purpose". *Chapin v. Stynchcombe*, 93 S.Ct. 1977, 1992, 412 U.S. 17, 44 (1973) (dissenting opinion, citing *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 138 (1968). In the instant case, the trustee in bankruptcy and the U.S. Attorney combined to effectuate a chill on the exercise of the petitioners' Fifth Amendment privilege while at the same

time impairing their right to present a defense in the bankruptcy proceeding.

Although Mr. Hale did, in fact, invoke the Fifth Amendment, he did so at the expense of a planned defense. Moreover, his choice can hardly be said to have been intelligently made, given the circumstances and the fact of the trustee's subpoena. Although Mr. Hale did invoke the Fifth Amendment, this situation was sufficiently unfair as to give rise to a constitutional violation in that none of the parties could meaningfully exercise the privilege. At the same time, the actions of the trustee, the court and the U.S. attorney were inherently unfair and violative of the petitioners' right to due process.

Due process requires adequate notice of the basis for governmental action; a neutral decision maker; an opportunity to make an oral presentation to the decision maker; an opportunity to present evidence or witnesses; the chance to confront and cross-examine witnesses; the right to an attorney; and a decision based on the record with a recitation of the reasons therefor. *See, e.g., In re Murchison*, 75 S.Ct. 623, 625-627, 349 U.S. 133 (1955). In the instant case, the trustee in bankruptcy and the U.S. Attorney's office combined to effectuate a deprivation of due process by concealing evidence that had both civil and criminal implications. The court compounded the deprivation by forcing the petitioners to exercise fundamental rights under duress and in a vacuum.

To perform "its high function in the best way 'justice must satisfy the

appearance of justice'". *Murchison, supra,* 75 S.Ct. at 625, quoting *Offutt v. U.S.*, 348 U.S. 11,14, 75 S.Ct. 11,13 (1954). In the case at bar, justice was neither satisfied nor satisfied the appearance of justice.

The intertwining of the unfair proceeding in bankruptcy and its effect on the petitioners' presentation of their civil defense as well as their preparation for their criminal defense presents a novel fact situation for determination. Hence, the ruling of this Court relative to whether petitioners' right to due process and to the assertion of their Fifth Amendment privilege were unduly impaired is necessary.

3. **The applicable federal statute and canon of ethics governing federal judges requires recusal of a federal judge based upon prejudice demonstrated by remarks made by the judge about litigants and their counsel, even though such remarks were made during the course of judicial rulings and may have been based on facts learned during the proceeding, where disqualification would otherwise be warranted.**

Finally, under the above-described circumstances and other, similar instances in the bankruptcy proceedings, the debtors and the non-debtor defendants requested that the bankruptcy judge recuse herself. The judge's refusal to do so, and the subsequent appellate confirmation of that refusal, has implications of significantly broader range than these litigants.

The standard for determining whether recusal should be granted is whether the judge's impartiality might reasonably be questioned. 28 U.S.C. § 455(a). Section 455(a) mandates an objective standard, which marks a departure from the prior subjective standard based on the judge's opinion. The standard was amended by Congress in 1974, and the purpose of the amendment was to "promote public confidence in the integrity of the judicial process". *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2202 (1988).

In *Liljeberg*, this Court granted certiorari to review the construction of section 455(a). 108 S.Ct. at 2197. In affirming the decision of the Court of Appeals that recusal should have been allowed, the majority reminded the federal bar that disqualification is proper where there is no bias but where the appearance of bias exists. *Id.* at 2202, quoting with approval the decision of the Court of Appeals as to which certiorari was granted.

Both the district courts and the Courts of Appeals have been scrupulous in their application of the disqualification standards. For example, in *Church of Scientology of California v. Cooper,* 495 F. Supp. 455 (D.C.Cal. 1980), the district judge disqualified himself even though he had "problems ... with the factual allegations contained in plaintiff's motion, and despite the Court's firm recollection and conviction that the allegations are false". 495 F. Supp. at 461.

Another illustration of the breadth with which courts have applied section 455 is found in *Roberts v. Ace Hardware,* 515 F. Supp. 29, 31 (N.D. Ohio 1981).

In *Roberts,* the plaintiff's attorney sought recusal of the trial court on the grounds of alleged bias against that attorney. 515 F. Supp. at 30. The movant cited "a long list of rulings" which he alleged "were so completely erroneous that they could only be the result of personal bias against counsel." *Ibid.*

The *Roberts* judge, District Judge Young, flatly denied actual bias on his part against the plaintiff's attorney. 515 F. Supp. at 30. He then observed:

> ... a sensitive judge is inclined to feel that once a party ... becomes convinced in his own mind that a judge is prejudiced against him, it makes no difference ... that he is mistaken in his conviction.

Id. at 31. Judge Young believed that the issue of whether a belief in bias was reasonable "ought to be approached from the viewpoint of the party ...

not of that famous fictitious character, the reasonable man." *Ibid.*

The learned Judge Young noted that the question of his recusal represented "a conflict between emotion and logic," with emotion being an important part of experience, the "'lifeblood of the law'". 515 F. Supp. at 31 (quoting Justice Oliver Wendell Holmes). The judge concluded by recusing himself, stating:

> This judge regrets that plaintiff's counsel has let his emotions override his judgment, to the extent that he feels there is a bias against him which does not in fact exist. Here, however, we are not concerned with facts but with feelings. The justice system would be impaired in its functioning if plaintiff's counsel were forced to trial before a judge that he is convinced, however wrongly, is biased against him.

515 F. Supp. at 31.

In *School District of Kansas City, Mo. v. State of Mo.*, 438 F. Supp. 830 (W.D. Mo. 1977), then-Chief Judge John W. Oliver considered a motion for recusal predicated upon sections 455(a) and 455(b) (1). Chief Judge Oliver considered and rejected the three asserted grounds for recusal. 438 F. Supp. at 832, 833, 834. He then went on to consider whether he should nonetheless recuse himself, finding that his denial of the motion was not decisive of whether he should continue to hear the case. 438 F. Supp. at 834. Chief Judge Oliver wisely observed:

> It is my view that the duty to recuse stated in the Code of Judical Conduct, which was developed by the Judicial Conference of the United States, establishes a higher standard than that imposed by any of the various statutes passed by the Congress. It is clear to me that in some exceptional cases a judge may be under duty to deny a motion to disqualify based on statutory grounds but that, consistently with the higher standard

> enunciated in the Code of Judicial Conduct, he should nevertheless take himself out of the case.

Id. at 835.

Chief Judge Oliver recused himself, and in so doing, discussed the opinion rendered by Justice Frankfurter in support of his decision not to participate in *Public Utilities Commission v. Pollack*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952). In that case, Justice Frankfurter emphasized that decisions on recusal should be guided by the concept that "the administration of justice should *reasonably appear to be disinterested* as well as *be so in fact.*" 343 U.S. at 467 (emphasis supplied).

In recusing herself in favor of a judge from another district, Judge Diana G. Murphy affirmed the profound importance of maintaining the integrity of the judiciary:

> Our Constitution created an independent federal judiciary in order to ensure that judicial decisions would be impartial and made only upon the law. There is a strong tradition in our country of assuring not only a fair and impartial judicial forum, but also the appearance of fairness and impartiality. *Congress has codified these values in the recusal statute. 28 U.S.C. § 455(a).* Although this court is not convinced that the excluded evidence relating to Judge Lord has any relevance whatsoever on the motion to dismiss, it is persuaded that the public might reasonably attribute such evidentiary rulings to partiality towards a judge on the same bench.

United States v. Singer, 575 F. Supp. 63, 68 (D. Minn. 1983) (emphasis supplied).

In the instant case, the district court affirmed the bankruptcy judge's failure to recuse herself by stating that "the moving party must demonstrate

personal bias or prejudice ... stem[ing] from an extrajudicial source". District Court Opinion at 2-3. The district court then held that because the bankruptcy judge denied one of the many facts asserted as a basis for recusal; because one of the bases for recusal was conflict with counsel; and because the alleged grounds for recusal depended in part upon facts learned in the judge's official capacity, recusal was improper. District Court Opinion at 3-4.

The failure of the bankruptcy judge to recuse herself, and the district court's rationale in affirming that failure, directly conflict with this Court's view of recusal. As underscored by *Liljeberg*, actual bias or prejudice need not be demonstrated; rather, the appearance of partiality must be avoided. *Liljeberg, supra*, 108 S.Ct. at 2202.

Moreover, to allow a judge to give the appearance of partiality by hiding behind the mask of facts acquired in that judge's official capacity is to thwart the plain meaning of the Congressional mandate for disqualification. Under that interpretation, only a judge who knew the litigants or their counsel outside of the context of a particular judicial proceeding could ever be disqualified. A judge who had no out of court acquaintance with a litigant or the attorney involved in the proceeding could never be disqualified, since even actual prejudice would arise from facts learned in that judge's official capacity.

By the district court's rationale, and by the rationale of the Court of Appeals to the extent that affirmance endorsed the reasoning of the lower

court, a judge who determined that he or she did not like an African-American litigant because of that person's race could not be disqualified if the judge only learned of the race of the litigant during a judicial proceeding. Although this example is an extreme one, it is a natural extension of the rationale of the lower court and cannot be endorsed by this Court.

Moreover, a judge is impermissibly prejudiced against a litigant or an attorney can express that prejudice in statements joined with the court's ruling, so that disqualification can be prevented. In the instant case, the bankruptcy judge denied the petitioners' request for a continuance to allow the petitioners a reasonable time to evaluate the impact of the recanted testimony on their fundamental rights, specifically their Fifth Amendment privilege against self-incrimination. In so doing, the judge remarked that the debtors had taken the Fifth on all previous occasions, so it would be no surprise if they now took the Fifth, and therefore concluded that the request was not reasonable.

If the debtors had, in fact, previously taken the Fifth Amendment, the judge learned of the fact in her official capacity. Unquestionably, the judge indicated a pre-judgment, namely, the assumption that the debtors would again assert the privilege. To allow the judge to continue to preside over a case in which she has acknowledged prejudice, merely because that prejudice arose from facts learned in her official capacity, is to thwart the purpose of section 455 by undermining the public's faith in the integrity of

the judicial process.

The lower court's ruling abridges the protection which Congress has given to participants in our judicial system. Moreover, this impermissible abridgement seems to have support in a number of Circuit Court holdings. Accordingly, this Court should grant certiorari to determine the proper scope of section 455.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the cause remanded to the district court for appropriate proceedings.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-2491WM

In re: Joseph Herman Hale & Eva Marie Hale *

Thomas J. Carlson,
Appellee,

vs.

Sheila Hartje; Shelly Hull; Sherry Hale,
Appellants.

Metropolitan National Bank

* * * * * *

Joseph Herman Hale, Eva Marie Hale,
Appellants,

vs.

Thomas J. Carlson,
Appellee,

* * * * * *

Thomas J. Carlson,
Appellee,

vs.

Joseph Herman Hale, Eva Marie Hale,
Appellants.

* Appeal from the United States District Court for the Western District of Missouri.

Appellants' petition for rehearing has been considered by the court and is denied.

August 1, 1991

Order Entered at the Direction of the Court:
Michael E. Gars
Clerk, U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-2491

In re: Joseph Herman Hale & Eva Marie Hale

Thomas J. Carlson,
Appellee,

v.

Sheila Hartje; Shelly Hull; Sherry Hale,
Appellants.

Metropolitan National Bank,

* * *

Joseph Herman Hale, Eva Marie Hale,
Appellants,

v.

Thomas J. Carlson,
Appellee,

* * *

Thomas J. Carlson,
Appellee,

v.

Joseph Herman Hale, Eva Marie Hale,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

[UNPUBLISHED]

Submitted: April 11, 1991

Filed: June 19, 1991

Before FAGG and BEAM, Circuit Judges, and Doty,* District Judge.

PER CURIAM.

The Hales appeal from the district court's affirmance of the bankruptcy court's order ruling on various motions, including the trustee's motion to approve settlement of the bankruptcy estate's interest in a related probate estate, and entering judgement in favor of the trustee on the trustee's adversary complaint seeking turnover. On appeal to this court, the Hales raise several arguments, all of which were carefully and adequately considered by the district court. Because we find no error, the judgment of the district court is affirmed. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

*The HONORABLE DAVID S. DOTY, United States District Judge for the District of Minnesota, sitting by designation.

United States District Court

WESTERN DISTRICT OF MISSOURI

JUDGEMENT IN A CIVIL CASE

JOSEPHY [sic] HERMAN HALE, et al.

V.

THOMAS J. CARLSON, TRUSTEE

CASE NUMBER: 90-3042-CV-S-4
90-3043-CV-S-4
90-3044-CV-S-4

☒ **Decision by Court.** This action came to a determination by the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Bankruptcy Court's order of November, 6, 1989, is affirmed.

Entered on August 1, 1990

August 1, 1990
Date

R. F. Connor
Clerk

Cindy S. Dunn
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In re: JOSEPH HERMAN HALE and EVA MARIE HALE,	)	
Debtors,	)	
JOSEPH HERMAN HALE, EVA MARIE HALE, SHERRY HALE, SHEILA HARTJE, SHELLY HULL and STATE FINANCIAL CORP.,	)	
Appellants,	)	
vs.	)	No. 90-3042-CV-S-4
	)	No. 90-3043-CV-S-4
THOMAS J. CARLSON, Trustee,	)	No. 90-3044-CV-S-4
	)	CONSOLIDATED
Appellees.	)	

ORDER

On February 1, 1990, appellants appealed the Bankruptcy Court's order of November 6, 1989. The Court will affirm the Bankruptcy Court's order.

Under Bankruptcy Rule 8013, a reviewing court may not set aside findings of fact unless clearly erroneous. *Granfinanciera, S.A.* v. *Nordberg*, 109 S.Ct. 2782, 2795 (1989); *In re Apex Oil Co.*, 884 F.2d 343, 348 (8th Cir. 1989). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Anderson*

v. *City of Bessemer*, 470 U.S. 564, 573 (1985); *In re Apex Oil Co.*, 884 F.2d at 348. The reviewing court is not so limited when a bankruptcy judge's error is one of law. The bankruptcy judge's conclusions of law are to be reviews do novo. *Id.* It is with these standards in mind that this Court proceeds with its analysis.

Appellants Joseph and Eva Hale are debtors in a Chapter 7 bankruptcy proceeding and appellants Sherry Hale, Sheila Hartje and Sherry [sic] Hull are debtors' daughters. Appellant State Financial Corporation is a creditor of the Hale daughters. The trustee filed a motion for approval of a settlement of the bankruptcy estate's interest in the probate estate of Thomas Graves, father of debtor Eva Hale. In addition, the trustee filed a complaint for turnover seeking recovery of a distribution from the probate estate to the Hale daughters and recovery of the value of horses claimed to have been sold by debtors to the Hale daughters prior to bankruptcy. In its order of November 6, 1989, the Bankruptcy Court granted the trustee's motion for approval of the settlement and entered judgment in favor of the trustee on both counts of the complaint for turnover. Appellants present six issues on appeal.

First, appellants argue that the Bankruptcy Court erred in denying appellants' motions to recuse. A motion to recuse is committed to the sound discretion of the trial judge and the standard of review on appeal is whether the judge abused his or her discretion. *Gilbert* v. *City of Little Rock, Arkansas*, 722 F.2d 1390, 1399 (8th Cir. 1983), *cert. denied*, 466 U.S.

972 (1984); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir. 1982). Judges are not to disqualify themselves unnecessarily. *Davis* v. *Commissioner of Internal Revenue*, 734 F.2d 1302, 1303 (8th Cir. 1984). The moving party must demonstrate personal bias or prejudice on the part of the judge. *United States* v. *Jones*, 801 F.2d 304, 312 (8th Cir. 1986). "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966) (citation omitted); *see also Jones*, 801 F.2d at 313; *Hale* v. *Firestone Tire & Rubber Co.*, 756 F.2d 1233, 1329 (8th Cir. 1985); *Davis*, 734 F.2d at 1303. The judge must disqualify himself or herself if a reasonable person would have a factual basis to doubt the impartiality of the judge. *United States* v. *DeLuna*, 763 F.2d 897, 907 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985); *Hale*, 756 F.2d at 1329; *Gilbert*, 722 F.2d at 1399; *In re Federal Skywalk Cases*, 680 F.2d at 1183; *United States* v. *Poludniak*, 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982).

The Bankruptcy Court judge did not abuse her discretion in denying appellants' motions to recuse as appellants have not demonstrated personal bias or prejudice by the judge based on an extrajudicial source. Appellants argue that the judge had out-of-court contacts with a creditor's attorney and failed to deny such contacts when confronted with them. However, the record reveals that after being asked about out-of-court contacts with

creditor's attorney Harold Glass the Bankruptcy Court stated unequivocally that "I've never had any conversations with the opposing counsel." Appellants' Exhibit I at Exhibit A, p. 5. Appellants also argue that the judge had a "hostile attitude" towards and was biased against debtors' counsel based upon previous cases before the judge. A controversy between a judge and an attorney is insufficient grounds for recusal without a showing of bias or prejudice. *Gilbert*, 722 F.2d at 1398-99. In addition, facts learned by the judge in her judicial capacity cannot be the basis for disqualification and adverse rulings alone of not demonstrate bias or prejudice. *Hale*, 756 F.2d at 1329. Appellants have failed to demonstrate bias or prejudice on the part of the judge.

Second, appellants argue that the Bankruptcy Court improperly denied appellants' request for a jury trial on the complaint for turnover. The complaint for turnover was filed on June 26, 1989, and service was obtained upon all defendants by July 3, 1989. On July 20, 1989, the court set a trial date of October 4, 1989. By order of August 3, 1989, the court granted appellants leave to file [sic] their answer on or before August 7, 1989. On August 8, 1989, appellant Sherry Hale file a motion to dismiss; the motion was denied on August 30, 1989. On September 25, 1989, appellants filed an answer to the complaint for turnover. At a September 26, 1989, pretrial conference the Bankruptcy Court stated that although the answer was filed out of time "I will overlook whatever possible defect that is, however, and consider that all the daughters have answered and that

anything as to the timeliness has been waived because the other parties have not objected to their answers," Attachment to Reply Brief of Appellants at 26, and moved the trial date to October 5, 1989. On the date of trial appellants made an oral request for a jury trial (Tr. at 5). The court determined that the motion was not timely because it was first raised on the morning of trial and that appellants waived a jury trial because their answers were filed late (Tr. at 6-7). Appellants argue that they are entitled to a jury trial on the complaint for turnover pursuant to *Granfinanciera, S.A.* v. *Nordberg,* 109 S.Ct. 2782 (1989). Appellants continue by arguing that, based upon the Bankruptcy Court's comments at the pretrial conference, their request for jury trial was timely even though their answer was filed out of time.

The trial court has the discretion to grant a belated request for a jury trial. Fed.R.Civ. P. 39(b); *see Littlefield* v. *Fort Dodge Messenger,* 614 F.2d 581, 585 (8th Cir. 1980), *cert. denied,* 445 U.S. 945 (1980) However, even assuming that appellants' request for a jury trial was timely filed pursuant to Fed.R.Civ.P. 38, the Bankruptcy Court did not abuse its discretion in denying appellants' request on the morning of trial. Appellants received service of the complaint by July 3, 1989. The Bankruptcy Court set an October 4, 1989, trial date on July 20, 1989. Thus, appellants had ample knowledge and time to request a jury trial prior to the morning of trial. Nonetheless, appellants' untimely answer did not request a jury trial and no such request was made at the pretrial conference. Appellants' last minute

request for a jury trial would appear to be an attempt to delay trial after appellants' motion for continuance was denied at the pretrial conference. The Bankruptcy Court noted at the pretrial conference that "the history of this case seems to be one of constant delay and request for continuance ... [I]t just took a long time to finally get the thing set down for trial and to have it stick ... I think in the interest of justice here, this is one where the case needs to move forward." Attachment to Reply brief of Appellants at 25. Thus, after the pattern of conduct in this case apparently intended to delay trials, granting appellants' request for a jury trial on the morning of trial would have further delayed disposition of these matters. The Eighth Circuit has stated:

> [T]he record shows that [plaintiff] engaged in a pattern of conduct apparently intended to delay trial. Granting his request for a trial by jury at the *pretrial conference stage* would have further delayed final disposition of the matter. In these circumstances, denial of the request was within the bounds of the discretion of the trial court.

Littlefield, 614 F.2d at 585 (emphasis added). In addition, the closer the request for a jury trial is to the date of the trial, the more restrictive the court should be in exercising its discretion to allow a trial by jury. *Judge* v. *Continental Casualty Co.*, 93 F.R.D. 372, 375 (E.D. Tenn. 1981). Other courts have exercised their discretion to deny as untimely requests for a jury trial made six days before trial, *In re Basin Refining, Inc.*, 30 Bankr. 578, 581-83 (Bankr. N.D. Tex. 1983), and twelve days before trial, *Lynch* v. *Consolidated Rail Corp.*, 76 F.R.D. 147, 147-49 (S.D.N.Y. 1977). Thus, it

is clear that the Bankruptcy Court did not abuse its discretion in denying appellants' request for a jury trial made on the morning of trial. Finally, the Court notes that appellants' answer to the complaint for turnover was untimely and therefore the request for a jury trial within ten days of the answer could also be considered untimely. *See Land* v. *Roper Corp.*, 531 F.2d 445, 449-50 (10th Cir. 1976).

Next, appellants argue that the Bankruptcy Court erred by denying appellants' request for a continuance based upon witness Richard Martin recanting his deposition testimony at trial. Mr. Martin was deposed on September 19, 1989. Prior to the commencement of trial on October 5, 1989, assistant United States Attorney David Jones announced that Mr. Martin would be testifying under a grant of immunity by the United States. Appellants and other parties request a continuance based upon surprise. The Court recessed for approximately one and one-half hours to allow the parties to question Mr. Martin. After the recess the motions for continuance were renewed based on an earlier meeting between Mr. Martin, Mr. Jones, a creditor's attorney, an attorney from the trustee's office and FBI personnel; a lack of time to thoroughly question Mr. Martin; the effect Mr. Martin's testimony would have on debtors' decision to invoke the Fifth Amendment right against self-incrimination; and surprise. The Court denied the motions for continuance.

A grant of continuance is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *Watson* v. *Miears*,

772 F.2d 433, 437 (8th Cir. 1985). The Bankruptcy Court did not abuse its discretion in denying appellants' motions for continuance. Mr. Martin was under subpoena and was not a surprise witness. (Tr. at 45). The parties could not be surprised that debtors were going to invoke the Fifth Amendment because they had done so at previous hearings. (Tr. at 37, 46). As the Bankruptcy Court stated, "[n]obody has indicated ... that anything would turn out differently, in fact, if this [trial] were continued." (Tr. at 47). Finally, the Bankruptcy Court recessed for one and one-half hours so the parties could question Mr. Martin. *Id.* Appellants have failed to demonstrate that they were prejudiced by the Bankruptcy Court's denial of their motion for continuance.

Fourth, appellants argue that the Bankruptcy Court erred in granting the trustee's motion for approval of a settlement of the bankruptcy estate's interest in the probate estate of Thomas Graves. Appellants argue that the court's finding that Mr. Martin was a credible witness was error as he had admittedly embezzled money from the probate estate, had incentive to give false testimony under immunity and had committed perjury at his deposition.

The Bankruptcy Court did not err in granting the trustee's motion. The court noted that no evidence was put on by any party indicating that the settlement was not in the best interest of the bankruptcy estate. (Tr. at 182). The Bankruptcy Court found that Mr. Martin's recanting of his deposition testimony was credible and continued by stating:

> I find that at this point he has nothing to lose, no reason to further lie, and that his explanation as to why he lied at his deposition is credible and is consistent with the rest of his story as was pointed out by [the trustee's attorney] in her closing argument. The man has, at this point, resigned as prosecutor of Ozark County, has surrendered his Bar license and has turned himself in to the FBI and the U.S. Attorney's Office for possible prosecution and testified credibly here today that in agreement with the U.S. Attorney that there would be no prosecution that he would testify truthfully. He also testified credibly as to the circumstances in which he changed his testimony after the deposition that it was in the midst of the deposition that he realized that his story would no longer hold water, that he was doing something wrong and at the conclusion of the deposition sought the advice of counsel in West Plains, Missouri, Mr. Garrett.

(Tr. at 186-87). Based on the foregoing, appellants failed to demonstrate that the Bankruptcy Court's finding Mr. Martin's testimony credible was clearly erroneous.

Fifth, appellants argue that the Bankruptcy Court erred in awarding the trustee damages on the complaint for turnover against the Hale daughters. Appellants argue that the trustee failed to prove that the assignment to the Hale daughters was a preferential transfer under § 548 or a fraudulent conveyance under § 544.

Appellant Shelli [sic] Jo Hull testified that she had purchased horses from her father, debtor Joseph Hale, in exchange for money she had loaned him. (Tr. at 196-97). However, she testified that the horses remained registered in her father's name. (Tr. at 196, 197), that she had no documents indicating that her parents owed her money, (Tr. at 198), and that the horses were kept on her parents' farms, (Tr. at 198-99). She further testified that

she sold some of the horse after this lawsuit was filed so the trustee could not get them if he won the suit. (Tr. at 199-200). The trustee also introduced evidence that the Hulls sold the horses for $7,310.75 (Tr. at 200-01, 208). The only evidence presented by appellants was a February 21, 1986, bill of sale for 17 to 20 horses from Joseph Hale to Shelli [sic] and Tim Hull for $6,500. (Tr. at 202-03). The Bankruptcy Court found in favor of the trustee and awarded damages of $7,310.75.

The Bankruptcy Court did not err in awarding the trustee damages against the Hale daughters on the complaint for turnover. The court noted that there "is a very suspicious circumstance surrounding this case." (Tr. at 211). The court acknowledge [sic] that there was no written documentation of the debt owned by debtors to appellant Hull and appellant Hull was vague in her testimony on when the loans were made. (Tr. at 209-10). In addition, appellant Hull was vague in her testimony regarding the amount of the debt. (Tr. at 194, 197). The court continued by pointing out that curiously there were no receipts evidencing the loan to the debtors or the sale of the horses to outsiders, but a bill of sale exists for a family transaction. (Tr. at 210). The court stated that the bill of sale was also suspect because debtor Joseph Hale had forged two other documents in this case. (Tr. at 210-11). The court noted that it would be illogical for debtor Joseph Hale to transfer the horses and not to transfer the registration because their value would be greatly reduced and that he never relinquished possession or control of the horses. (Tr. at 211-12). Appellants have offered

nothing to demonstrate that such factual findings of the Bankruptcy Court are clearly erroneous.

Finally, appellants argue that the Bankruptcy Court erred in failing to grant appellants a new trial but offer no argument to demonstrate such error. Thus, the Bankruptcy Court did not err in denying appellants a new trial.

Accordingly, it is hereby

ORDERED that the Bankruptcy Court's order of November 6, 1989, is affirmed.

Russell G. Clark
RUSSELL G. CLARK, JUDGE
UNITED STATES DISTRICT COURT

Date: August 1, 1990

United States Bankruptcy Court

FOR THE WESTERN DISTRICT OF MISSOURI

THOMAS J. CARLSON
Plaintiff

v.

SHERRY L. HALE, SHEILA M. HARTJE, SHELLY HULL AND METROPOLITAN BANK

Case No. 87-04373-S-7-KMS

Adversary Proceeding No. 89-6059-S

JUDGEMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable KAREN M. SEE, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED: that the motions for recusal are overruled.

IT IS FURTHER ORDERED that the motion to abstain is overruled.

IT IS FURTHER ORDERED that all applications for continuance are overruled.

IT IS FURTHER ORDERED That the trustee's motion to approve settlement is sustained and all objections thereto are overruled.

IT IS FURTHER ORDERED that judgment is entered in favor of trustee and against Shelly Hull in the amount of $7,310.75 on Court II of the adversary complaint.

IT IS FURTHER ORDERED that judgement is further entered in favor of the trustee and against Sherry Hale, Sheila Hartje and Shelly Hull in the amount of $10,000.00 on Court I of the adversary complaint.

IT IS FURTHER ORDERED that State Financial Corp. has no interest in the probate estate of Thomas Graves.

NOVEMBER 6, 1989
Date of issuance

R. F. CONNOR
Clerk of Bankruptcy Court

Jamie I. Hinkee
(By) Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In re:

JOSEPH HERMAN HALE EVA MARIE HALE	)	
	)	Case No. 87-04373-S-7-KMS
THOMAS J. CARLSON TRUSTEE IN BANKRUPTCY,	)	
Plaintiff,	)	
v.	)	Adv. No. 89-6059-S
SHERRY L. HALE, SHEILA M. HARTJE, SHELLY HULL, and METROPOLITAN NATIONAL BANK,	)	
Defendants.	)	

ORDER

On October 5, 1989, the Court took up for hearing all pending motions in this estate and the adversary action *Thomas J. Carlson, Trustee, v. Sherry L. Hale, Sheila M. Hartje, Shelly Hull and Metropolitan National Bank* Adversary No. 89-6059-S. Debtors appear by and through their attorney Corrine M. Corley. Thomas J. Carlson, Trustee, appeared in person and by and through his attorney June Clark. Creditor Central Production Credit Association appeared by and through its attorney Harold Glass. Intervenor State Financial Corporation appeared by and through its attorney David Shroeder. Shelly Hull, Sherry Hale and Sheila Hartje (hereinafter referred to as the "Hale daughters") appeared by and through their attorney

Carl Smith. Defendant Metropolitan National Bank was previously dismissed from the adversary action.

In the main case, the Court took up debtors' Motion for Recusal, the Trustee's Motion to Approve Settlement and all objections to the Motion to Approve Settlement.

In the previously referenced adversary action, the Court took up for trial the adversary complaint, motions for continuance by State Financial, the debtors and the Hale daughters, the Hale daughters' Motion to Abstain, and the Hale Daughters' Demand for Jury Trial.

The Hale daughters' demand for jury trial was filed on October 5, 1989. The Answers of the Hale daughters were due to be filed with the Court more than ten days prior to October 5, 1989.

Evidence was heard jointly on Count II of the above-referenced adversary complaint and the Motion to Approve Settlement by agreement of all parties to avoid two separate evidentiary hearings which would necessarily have included the same evidence. Prior to the presentation of evidence, the debtors, State Financial Corporation and the Hale daughters moved the Court for a continuance based on a claim of surprise relating to the testimony of witness Richard Martin. Mr. Martin's deposition was taken prior to trial. The Court recessed for approximately one and a half hours after the motions for continuance to allow the parties to meet once again with Mr. Martin and to question Mr. Martin concerning his knowledge and his proposed testimony and changes in that testimony from his prior

deposition testimony.

The Trustee's Motion to Approve Settlement requests the Court's approval of a settlement between the Trustee and Retha and Joseph Jarman of a partition suit pending in the Circuit Court of Ozark County, Missouri. Count II of the above-referenced adversary complaint requests the Hale daughters to turn over to the Trustee $10,000.00 paid from the probate estate of Thomas Graves, deceased, to the Hale daughters.

Richard Martin was called as a witness by the trustee. Mr. Martin testified that in September, 1981, he was appointed as the personal representative of the Estate of Thomas Graves, deceased, in Ozark County, Missouri. Mr. Martin was an attorney at that time. Martin further testified that Mr. Graves died intestate and was survived by two daughters, debtor Eva Hale and Retha Jarman. Mr. Martin stated that the probate estate consisted of cash, personalty and two parcels of real estate. Martin also testified that throughout the handling of the Graves estate Eva Hale and Retha Jarman were represented by counsel. Martin stated that Mrs. Hale and Mrs. Jarman were continually at odds concerning the Graves estate. Mrs. Jarman and her husband filed a partition action in the Circuit Court of Ozark County, Missouri, concerning the two parcels of real estate in the probate estate. Debtors counterclaimed in that action claiming that a parcel of real estate transferred to Mr. and Mrs. Jarman by Thomas Graves prior to Mr. Graves' death was obtained by the exercise of undue influence and should come into the probate estate.

Mr. Martin testified that over a period of time around 1983 he converted all of the funds in the probate estate of Thomas Graves to his own personal use. He did not file any accountings for the probate estate with the Probate Court in Ozark County, Missouri, until May, 1989. Mr. Matin further testified that the accounting filed in May, 1989, falsely showed that the probate estate had cash assets of approximately $40,000.00 when, in fact, the estate had no funds at that time.

Mr. Martin testified that in June, 1988, he made a distribution from the probate estate, at the request of Eva Hale, to the Hale daughters in the amount of $10,000.00. Mr. Martin testified that he deposited funds from either his personal funds or his law firm funds in the probate estate checking account so that the check to the Hale daughters would clear.

Mr. Martin testified that in approximately December, 1987, the debtors filed a complaint with the Missouri Bar Association concerning the Thomas Graves estate and Mr. Martin's handling of the estate. That matter was resolved in January, 1988. Martin stated that sometime in the summer of 1988 the debtors came to his law office. Martin took Joe and Eva Hale into his private office. Joe Hale then requested that he meet with Mr. Martin privately. Mr. Martin testified that he and Mr. Hale then went into another private office where the two men met alone. Joe Hale told Mr. Martin if Mr. Martin would help Mr. Hale out that Mr. Martin would have no more trouble with the bar association and that the Hales would never ask for the interest on the money in the probate estate. Mr. Martin stated that he

believed that Mr. Hale had found out that Mr Martin had converted the funds from the probate estate and that Mr. Hale was blackmailing Mr. Martin. Mr. Hale then showed Mr. Martin a document titled "Agreement" and told Mr. Martin to put it in proper legal form and to date it about the same date as the date on the "Agreement" which was dated in March, 1982. Martin either prepared the document himself or had his office staff prepare the document which was backdated to 1982. The document was titled "Assignment of Entire Interest in Decedent's Estate" and purported to assign Eva Hale's interest in the Thomas Graves estate to the Hale daughters and was filed with the probate court in 1989.

The video-taped deposition of Retha Jarman was admitted into evidence. Mrs. Jarman testified that she had conversations with debtor Eva Hale on several occasions since the death of Thomas Graves. In 1988 Eva Hale asked Mrs. Jarman whether Mrs. Jarman would be more agreeable to reaching a settlement in the Graves estate if Mrs. Hale were to assign, in the future, her interest in the Graves estate to the Hale daughters. Mrs. Hale never told Mrs. Jarman that she had, in fact, assigned her interest in the Graves estate to the Hale daughters. Mrs. Jarman also testified that the transfer to her of the parcel of real estate by her father prior to his death occurred in 1979 or 1980. Mrs. Jarman never discussed the transfer with Mr. Graves until after she and her husband received the deed to the property in the mail. Mrs. Jarman further testified that the settlement with the trustee in the amount of $30,000.00 on the partition action was fair and

reasonable.

Debtor Joseph Hale was called as a witness by the trustee. Mr. Hale asserted his fifth amendment rights in response to each of the questions asked by counsel for the trustee.

The final witness on the Motion to Approve Settlement and Court II of the adversary petition for the trustee was Steve Freeman, a real estate broker, appraiser and auctioneer. Mr. Freeman testified that the value of the two parcels of real estate in the probate estate was approximately $175 per acre. The two parcels totaled approximately 180 acres.

No other parties presented evidence on either the Motion to Approve Settlement or Count II of the adversary action.

Count I of the adversary action concerns an allegedly fraudulent transfer of horses by the debtors to their daughter Shelly Hull. The trustee presented deposition testimony of Shelley [sic] J. Hull, a list of the stipulated values of the horses and asked the Court to take judicial notice of the substantial debt owed by the debtors to Central Production Credit Association at the time of the transfer. Ms. Hull presented no evidence.

After considering all of the evidence and arguments of counsel the Court finds that the various applications for continuance are denied. The parties had an opportunity to depose witness Martin. Additionally, the Court allowed the parties a substantial recess to reinterview M. Martin. Mr. Martin was a witness equally available to all parties. The claim of surprise is insufficient, under all of the circumstances, to warrant a continuance.

The Court further finds that consideration of the motion to approve settlement does not constitute an exercises of control over the probate estate. The prior agreed* order of abstention entered on March 24, 1988, prior to the trustee's appointment, does not deprive the court of jurisdiction to approve settlement of the parties' action.

The court further finds that there are insufficient grounds to sustain the motions for recusal.

The court further finds that answers were due to be filed by the Hale daughters on or before August 13, 1989. The demand for jury trial was untimely.

The court further finds that the notice concerning the motion to approve settlement was given sufficiently in advance of the hearing and that no party was prejudiced due to insufficient notice.

The court further finds that Richard T. Martin is not a necessary party.

The court finds that the trustee's evidence in all respects was undisputed in that no other parties offered any evidence. Richard T. Martin is a credible witness. Mr. Hale's invoking of the 5th amendment entitles the trustee to the benefit of the inference that his answers would have been adverse to his interest. In part, the court infers that Mr. Hale's refusal to answer questions concerning the "agreement" and its creation after bankruptcy is adverse to his interest.

---

*Agreed between Jarmon and the debtors, to allow partition action already on file in state court to proceed.

The court further finds that the debtors conspired to defraud the trustee and attempted to conceal assets of the bankruptcy estate.

The court further finds that the debtors transferred to Shelly Hull, daughter of debtors, certain horses with a stipulated value of $7,310.75 and that several badges of fraud surrounded that transaction.

IT IS FURTHER ORDERED that the motions for recusal are overruled.

IT IS FURTHER ORDERED that the motion to abstain is overruled.

IT IS FURTHER ORDERED that all applications for continuance are overruled.

IT IS FURTHER ORDERED that the trustee's motion to approve settlement is sustained and all objections thereto are overruled.

IT IS FURTHER ORDERED that judgement is entered in favor of the trustee and against Shelly Hull in the amount of $7310.75 on Count II of the adversary complaint.

IT IS FURTHER ORDERED that judgement is further entered in favor of the trustee and against Sherry Hale, Sheila Hartje and Shelly Hull in the amount of $10,000.00 on Count I of the adversary complaint.

IT IS FURTHER ORDERED that State Financial Corporation has no interest in the probate estate of Thomas Graves.

KAREN M. SEE
U.S. Bankruptcy Court